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IN THE

Supreme Court of the United States

October Term, 1957

No. ~~1010~~ 78

SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims.

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IRL DAVIS BRETT,

SUBJECT INDEX

	PAGE
Citation to opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statutes involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	14

Appendices:

Appendix "A." Excerpt of relevant portions of Act of August 18, 1941, 55 Stat. 638 et seq. (H. R. 4911, Chapter 377) ..... App. p. 1

Appendix "B." Opinion of the Court of Claims ..... App. p. 3

TABLE OF AUTHORITIES CITED

CASES — PAGE

A. W. Duckett & Co. v. United States, 266 U. S. 149, 45 S. Ct. 38, 69 L. Ed. 216 ..... 9, 13

County of Los Angeles v. So. Cal. Tel. Co., 32 Cal. 2d 378, 191 P. 2d 773 7

Dore v. United States, 119 Ct. Cls. 560, 97 Fed. Supp. 239 8

Fix v. City of Tacoma, 171 Wash. 196, 17 P. 2d 599 12

International Paper Company v. United States, 282 U. S. 399, 51 S. Ct. 176, 75 L. Ed. 410 ..... 6, 8

Joslin Co. v. Providence, 262 U. S. 668, 43 S. Ct. 684, 67 L. Ed. 1167 8

Kelletville Gas Co. v. United States, 56 Fed. Supp. 919 12

Kimball Laundry Co. v. United States, 338 U. S. 1, 69 S. Ct. 1434, 93 L. Ed. 1765 13

Los Angeles v. Los Angeles Gas & Electric Corp., 251 U. S. 32, 40 S. Ct. 76, 64 L. Ed. 121 7

Los Angeles County v. Wright, 107 Cal. App. 2d 235, 236 P. 2d 892 7

Mitchell v. United States, 267 U. S. 341, 45 S. Ct. 293, 69 L. Ed. 644, 157 Fed. Supp. 935 8

Moots v. Kasten, 90 Cal. App. 2d 734, 203 P. 2d 537 7

Olson v. United States, 292 U. S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 11

Omnia Co. v. United States, 261 U. S. 502, 43 S. Ct. 437, 67 L. Ed. 773, 157 Fed. Supp. 936 8

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322 9

Pumpelly v. Green Bay, etc. Canal Co., 80 U. S. (13 Wall.) 166, 20 L. Ed. 557 10

Portsmouth etc. Hotel v. United States, 260 U. S. 327; 43 S. Ct. 135, 67 L. Ed. 287 9

Russell v. Sebastian, 233 U. S. 195, 34 S. Ct. 517, 58 L. Ed. 912 7

PAGE

South Pac. R.R. v. San Francisco Savings Union, 146 Cal. 290, 79 Pac. 961 10

United States v. 2979.72 Acres of Land etc., 235 F. 2d 327 14

United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 ..... 7, 9

United States v. General Motors, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311 9

United States v. Kansas City Life Ins. Co., 339 U. S. 799, 70 S. Ct. 885, 94 L. Ed. 1277 9

United States v. Lynah, 188 U. S. 445, 23 S. Ct. 349, 47 L. Ed. 539 9

United States v. Powelson, 319 U. S. 266, 63 S. Ct. 1074, 87 L. Ed. 1390 7

United States v. Twin City Power Co., 248 F. 2d 108 14

United States v. Welch, 217 U. S. 333, 30 S. Ct. 527, 54 L. Ed. 787 9

Ward v. Monrovia, 16 Cal. 2d 815, 108 P. 2d 425 11

Western Union v. Hopkins, 160 Cal. 106, 116 Pac. 557 7

RULES

Rules of the Court of Claims, Rule 38(c) 2

STATUTES

California Civil Code, Sec. 801 7

California Civil Code, Sec. 802 7

55 Statutes at Large, p. 638 2

United States Code, Title 28, Sec. 1255(1) 1

United States Code, Title 28, Sec. 1491(1) 2

United States Code, Title 28, Sec. 1491(4) 2

United States Constitution, Fifth Amendment 2, 8, 12

TEXTBOOK

17 California Jurisprudence 2d, Easements, par. 30, p. 136 11

IN THE

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No. .....

October Term, 1957

SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims.

Southern Counties Gas Company of California prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on January 15, 1958.

Citation to Opinion Below.

The opinion of the Court of Claims [R. 35] printed in Appendix B hereto, *infra,* page 3, is reported in 157 Fed. Supp. 934, and 138 Ct. Cls. .....

Jurisdiction.

The judgment of the Court of Claims was entered on January 5, 1958 [R. 35]. Rehearing was denied March 5, 1958 [R. 45]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255(1). Federal

jurisdiction of the Court of Claims was invoked under 28 U. S. C., Section 1491(1) and (4), and the Fifth Amendment to the Federal Constitution.

Questions Presented.

I.

Is there a taking of private property within the Fifth Amendment where the Government requires disconnection or removal of pipelines and fittings installed under franchises and, because the cost of such removal would exceed the salvage value, there results a total destruction of the value of such property?

II.

Where the judgment below is based on the misconception that petitioner only lost its customers, whereas in fact the claim is for the physical value of pipes and fittings which the parties have stipulated and the lower court has found were totally destroyed in value, will this Court correct the error?

Constitutional Provisions and Statutes Involved.

This cause involves an application of that portion of the Fifth Amendment reading "* * * nor shall private property be taken for public use without just compensation." The statutory provision involved is the Act of August 18, 1941, 55 Statute 638, relevant portions thereof are printed in Appendix A, *infra*, pages 1-2. By stipulation [R. 31] and court order [R. 32] the trial below was limited to the issue of liability under Rule 38(c) of the lower court. Such rule is printed in Appendix A, *infra*, pages 1-2.

Statement.

The case below was limited by stipulation [R. 31] and court order [R. 32] to a determination of the issue of liability and the entire evidence consisted of the Agreed Statement of Facts [R. 23-31], written exhibits [A, C, D, E and F] and one photograph [Ex. B].

Petitioner is a public utility [R. 23, 39] and, at all times relevant here, was the owner of and maintained and operated a network of underground transmission lines, service pipes and distribution facilities to supply gas under pressure to residential, industrial, commercial and agricultural consumers [R. 26, 41]. Such facilities were installed and maintained on private property within deeded right of way easements and under public streets, roads and alleys under written right of way easements granted in franchises from the County of Los Angeles and the City of Montebello [R. 26-27, 41 and Ex. "C"].

Pursuant to the Whittier Narrows Flood Control Basin Act [R. 23, 39, Appx. A] the United States has erected a large dam to control the flood waters of two converging rivers [R. 23, 39] by intercepting and temporarily impounding such flow in a reservoir upstream of such dam and releasing it below in controlled and regulated flows [R. 24, 39].

To comply with the Congressional mandate, the United States elected to acquire flowage easements or the fee simple title to all lands, and the improvements thereon, lying above the dam to and within contour elevation 239 mean-sea level [R. 23-26, 39-40], together with title in fee simple to the area required for the dam and spillways [R. 25, 40], all of which are referred to in the record as the "taking area" [R. 26, 41] and will be so described herein.

Petitioner's facilities were installed throughout this "taking area" [R. 26, 41]. Neither the Agreed Statement nor the lower court's findings recite that the facilities within the "taking area" were only a portion of petitioner's system, nor do either of them negative such fact. However, the franchises [Ex. "C"], the maps [Ex. "F"] and, particularly Schedule III to the Petition [R. 13] affirmatively disclose that such system extends outside of such "taking area," and the pipes taken serviced consumers outside such taking area and had to be replaced as a result of Respondent's actions. The United States did not *expressly* take such facilities, by condemnation or purchase, excepting those which were located in and under the damsite and its appurtenant embankments, diversion channels, spillways and outlet works within what was called Segment "G" [R. 27-28, 42].

Instead, through condemnation and purchase it acquired such flowage rights and fee from and paid the *fee owners* and purported to *except* existing "public utilities * * * and pipelines" [R. 27-28, 42]. It paid or refused to pay petitioner for its loss of its facilities according to whether the Army Corps of Engineers decided such facilities would interfere with or were needed to serve the flood control project [R. 27-29, 42-43]. But it *instructed* petitioner to *disconnect or remove* the facilities which the Government purported to *except* from its taking and refused to pay for [R. 30, 44] and it was stipulated [R. 30] and found by the lower court [R. 44] that

> "after disconnecting and blocking off its facilities and taking such safety precautionary measures as were necessary for public protection (petitioner) abandoned in place its facilities so disconnected and

blocked off. The cost of removal of said facilities would exceed their salvage value, and their value represents a total loss to (petitioner)".

It is petitioner's contention that such governmental actions constituted a taking of such facilities and its claim is for the depreciated market value thereof. While petitioner originally made claim for the easement and franchise rights taken by the Government's actions and for its loss as a going concern resulting therefrom [R. 28-29, 43], it disavowed such claims in the lower court and restricted its claim to the value of the physical assets and repeats such disavowal here.

The lower court found for the United States upon the grounds that the injury to petitioner's property was consequential and consisted of a non-compensable business loss "due to the removal of (petitioner's) customers" within the "taking area" [R. 37-39]. In so doing the lower court completely overlooked the *facts* that (1) petitioner was making no claim for loss of business through loss of customers or otherwise; (2) the "facilities" within the "taking area" were an integral part of petitioner's entire system and served areas *outside* of such "taking area"; and (3) petitioner's loss of the value of the *physical facilities in place* was caused *directly* by the *Government's instruction* that they be *disconnected* and their being *blocked off* in compliance with such instruction.

As a result the lower court has decided an important constitutional issue in direct conflict with one decision of this Court and probably not in accord with other applicable decisions of this Court.

Reasons for Granting the Writ.

1. The court below has misconceived the true nature of petitioner's claim and the facts as disclosed by the record in support thereof. In its opinion, the lower court states:

> "We do not reach value unless the pipes have been taken, which we think is not the case. For the loss here too is due to the taking of the property of others, that is, of plaintiff's customers. A milk distributor, to use a rough analogy, might suffer loss by the turning of the area of a milk route into a public park. But this would not constitute a taking of the route or of the instrumentalities by which it was served. The value of land and improvements might include an element due to their location on the route—a question we do not decide—but the loss to the milk distributor is a business loss."

To the contrary, the only claim which the petitioner made when the cause was submitted and the only claim which it makes here is for the complete destruction of the value of its pipes and fittings, which it was stipulated [R. 29, par. 18] and the lower court found [R. 44] were required to be disconnected and removed and which in compliance with such governmental mandate were disconnected and blocked off with the agreed and found result that petitioners have lost the entire value thereof.

2. The decision of the Court below is in direct conflict with this Court's decision in *International Paper Company v. United States* (1931), 282 U. S. 399, 408, 51 S. Ct. 176, 75 L. Ed. 410. For the purpose of this numbered reason we will assume (though the record refutes it) that petitioner's facilities served no area except the "taking area." It was stipulated and the lower court has found:

(a) Petitioner's facilities were, in part, installed and maintained within deeded rights-of-way easements in

privately owned land within the taking area [R. 26, par. 11; 26-27, par. 12; 28-29, par. 16; 41, par. 11; and 43, par. 15]. Under California law such an easement was a private property right and an interest in such privately owned land (Cal. Civ. Code, Secs. 801-802; *Moots v. Kasten* (1949), 90 Cal. App. 2d 734, 736, 203 P. 2d 537; *Los Angeles County v. Wright* (1951), 107 Cal. App. 2d 235, 241, 236 P. 2d 892). State law controls as to what is property. (*United States v. Powelson* (1943), 319 U. S. 266, 279, 63 S. Ct. 1074, 87 L. Ed. 1390; *United States v. Causby* (1946), 328 U. S. 256, 266, 66 S. Ct. 1062, 90 L. Ed. 1206.)

(b) Such facilities were, in part, installed and maintained in public streets, roads and alleys of the taking area under rights of way granted to petitioner by franchises from local public bodies [R. 26-27, par 12; R. 41, par. 11; see Ex. C]. These, too, under California law were private property rights in such land. (*Russell v. Sebastian* (1914), 233 U. S. 195, 204, 34 S. Ct. 517, 58 L. Ed. 912; *Los Angeles v. Los Angeles Gas & Electric Corp.* (1919), 251 U. S. 32, 39, 40 S. Ct. 76, 64 L. Ed. 121; *Western Union v. Hopkins* (1911), 160 Cal. 106, 120, 116 Pac. 557, 563; *County of Los Angeles v. So. Cal. Tel. Co.* (1948), 32 Cal. 2d 378, 385, 191 P. 2d 773, 776.)

(c) The Government instructed petitioner to disconnect and remove its facilities from such area [R. 30, par. 18; 43-44, par. 17].

(d) Petitioner complied by disconnecting and blocking off such facilities and has lost their total value [R. 30, par. 29; 43-44, par. 17].

(e) The Government has refused to pay such loss [R. 30, par. 19; 44, par. 18].

The lower court purported to follow *Omnia Co. v. United States* (1923), 261 U. S. 502, 510, 43 S. Ct. 437, 67 L. Ed. 773 (*Cf.*, 157 Fed. Supp. 936), but as pointed out by this Court in *International Paper Co., supra,* 408, no part of Omnia's property was taken or destroyed. Instead, the taking of *another's* property prevented that other private property owner from fulfilling a contract previously made with Omnia. This Court further held in *International Paper Co., supra,* 408, that where, as here, the Government has interfered with and destroyed a lawfully protected property right such as an easement (in *International Paper* to take water—here to conduct gas through pipes etc. then installed and maintained), a taking occurs and compensation is required under the Fifth Amendment.

As the Court of Claims, itself, has said

> "The Constitutional right to just compensation is a matter of substance and is not contingent upon the form by which the Government chooses to acquire the property".
>
> *Dore v. United States* (1951), 119 Ct. Cls. 560, 580, 97 Fed. Supp. 239.

In footnote 3 of the judgment below, the Court also justifies its decision by this Court's holdings in *Joslin Co. v. Providence* (1922), 262 U. S. 668, 675, 43 S. Ct. 684, 67 L. Ed. 1167 and *Mitchell v. United States* (1925), 267 U. S. 341, 345, 45 S. Ct. 293, 69 L. Ed. 644 (*Cf.*, 157 Fed. Supp. 935), but neither is applicable here. In both liability to compensate for physical property taken was admitted and paid. Compensation was denied only for business losses or frustration.

3. The decision of the Court below, though it disavows the same, is probably not in accord with these applicable decisions of this Court:

(a) A destruction of physical private property for public purposes is a taking (*United States v. Welch* (1910), 217 U. S. 333, 339, 30 S. Ct. 527, 54 L. Ed. 787; *A. W. Duckett & Co. v. United States* (1924), 266 U. S. 149, 151, 45 S. Ct. 38, 69 L. Ed. 216; *United States v. General Motors* (1945), 323 U. S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311; *United States v. Causby* (1946), 328 U. S. 256, 261, 66 S. Ct. 1062, 90 L. Ed. 1206, and *United States v. Kansas City Life Ins. Co.* (1950), 339 U. S. 799, 809-810, 70 S. Ct. 885, 94 L. Ed. 1277).

(b) While private property may be regulated to a degree, if such regulation thereof goes so far as to totally destroy its value, it becomes a taking. (*Pennsylvania Coal Co. v. Mahon* (1922), 260 U. S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322.)

(c) The disavowal of intent to take such portion of petitioner's physical property is irrelevant if, in fact (as has been found and stipulated to) its value has been destroyed. (*United States v. Lynah* (1903), 188 U. S. 445, 464-465, 23 S. Ct. 349, 47 L. Ed. 539; *Portsmouth etc. Hotel v. United States* (1922), 260 U. S. 327, 329, 43 S. Ct. 135, 67 L. Ed. 287.)

(d) An exception from a taking which is incompatible with the use for which private property is taken and which leaves no value in the property purported to be excepted will be disregarded and compensation will be required for the taking thereof.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and making it an authority for invasion of private right under the pretext of the public good. . . ."

Pumpelly v. Green Bay, etc. Canal Co., 80 U. S. (13 Wall.) 166, 177-178, 20 L. Ed. 557.

To the same effect:

Cf., So. Pac. R.R. v. San Francisco Savings Union (1905), 146 Cal. 290, 293-294, 79 Pac. 961, 962.

This Court will take judicial notice that gas, particularly when in pipelines under pressure, is highly volatile, explosive and dangerous and it has been stipulated [R. 30, par. 18] and found by the lower court [R. 44, par. 17] that these facilities were disconnected and blocked off as "safety precautionary measures for public protection." We believe that Government counsel will not deny that subsequent to the execution of the Agreed Statement of Facts, a large portion of the facilities which are here involved became and will continue to be imbedded under a permanent artificial lake, known as Legg Lake, which lies above the reservoir dam and has been created and is

maintained by the County of Los Angeles under an express contract with the United States.[1] Thus the Government's instructions and actions, as a part of the flood control project, have completely destroyed petitioner's secondary easements[2] for entry, maintenance and repair of such facilities.

Again the Court below misunderstood the facts. It states, "if there were land and improvements not taken which could be served by the aid of these easements and right of way, except for the project, we would have a different question."

The entire Schedule III of petitioner's claim is for relocation from the taking area of pipes to points outside the taking area to service consumers outside such area. Thus, both the pipes and the easements were in fact taken.

4. The Court below has decided an important question of federal law which has not been, but should be settled by this Court. It is this:

> When a public utility has valid existing franchises and private easements, which by local law are direct interests in the land, and it has installed pipelines and other operating facilities therein and is serving customers within the taken area through such facilities, may the United States acquire the fee or

---

[1]This is a matter of such general notoriety in Los Angeles County, California, as not to require proof. (*Cf., Olson v. United States*, 292 U. S. 246, 257, 54 S. Ct. 704, 78 L. Ed. 1236.)

[2]Under California law, right of way easements carry with them, of necessity, secondary easements for entry, maintenance and repairs. (17 Cal. Jur. 2d., Easements, par. 30, p. 136; *Ward v. Monrovia* (1940), 16 Cal. 2d 815, 821-822, 108 P. 2d 425.)

flowage easements, and instruct and require the utility to sever and either remove or block off such facilities, without becoming liable for a taking thereof under the Fifth Amendment?

The lower court found that such was a "consequential loss or injury resulting from lawful governmental action (for which) the law affords no remedy" [R. 38-39] and cites in support thereof a district court decision which was not reviewed and has never been cited or approved upon such issue., viz., *Kelletville Gas Co. v. United States* (1944), 56 Fed. Supp. 919, 920. It also cites and relies upon *Fix v. City of Tacoma*, 171 Wash. 196, 17 P. 2d 599. While we disagree with the lower court in that we believe that both of the above cases are distinguishable *on the facts* from the case at bar, because in *Kelletville* the court found that

> "all pipes and other properties of the plaintiff have always been situated above the (maximum water level)" (56 Fed. Supp. 919, Findings 5 and 8).

and in *Fix*, the court said

> "Now in considering (plaintiff's) loss, it must be borne in mind that he still owns the water plant and mains and has complete dominion over them. The City (defendant) has not invaded or encroached upon his property in any way. Nor has it in any manner disturbed or interfered with his right, title or possession * * *".

Nevertheless, if we are wrong, this Court should decide such important issue because the Government has been contending and, apparently, will continue to contend, upon *Kelletville* and the lower court decision here, that it may utterly destroy a utility's physical property in place, re-

quire it to discontinue its services, and pay for all other portions of the fee which are adversely affected, but by purported exception, be free from all liability to the utility.

We respectfully ask this Court to accept jurisdiction and to announce that such is *not* the law!

This Court has said

> "* * * we can see no grounds for attributing to the United States the extraordinary intent to recognize and pay for other interests, but to exclude the claimant."
>
> *A. W. Duckett & Co. v. United States, supra,* p. 151.

It has been said with reference to governmental actions which had the "inevitable effect of depriving the owner of the going concern value of his business" (a laundry) "the business is at the Government's disposal *whether or not it chooses to avail itself of it*" (emphasis supplied). (*Kimball Laundry Co. v. United States* (1949), 338 U. S. 1, 13, 69 S. Ct. 1434, 93 L. Ed. 1765.)[3]

More recently the 4th Circuit has spoken as follows with reference to the taking of fee or flowage easement (as here) and paying all but allegedly excepted easement owners:

> "The proposition that because the Government has obtained (and paid for) a conveyance from the fee owner, it may acquire by condemnation the right to flood the land without paying anything to the owner

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[3]While petitioner has waived going concern loss, surely if such must be paid for, as held in *Kimball*, it should be paid for physical portions of the real property which have been destroyed.

of the flowage easement, has nothing to commend it either in logic or in common sense" (insert supplied).

United States v. 2979.72 Acres of Land etc. (1956), 235 F. 2d 327, 329.

"* * * where an easement has been conveyed to another by the owner of the fee, the owner of the fee is entitled to share in the award to the extent of the value of the easement * * *. If the Government may acquire the right to flood the land by taking a conveyance of the interest remaining in the fee simple owner after conveyance of the easement, no amount of sophistry can obscure the fact it is acquiring for nothing the interest represented by the easement".

United States v. Twin City Power Co. (1957), 248 F. 2d 108, 115.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BATES BOOTH,

Counsel for Petitioner.

IRL DAVIS BRETT,

Of Counsel.

May 29, 1958.

APPENDIX "A."

Excerpt of Relevant Portions of Act of August 18, 1941, 55 Stat. 638 et seq. (H. R. 4911, Chapter 377):

AN ACT

Authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled

Section 3. That the following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized in the interest of national security and the stabilization of employment, and shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and the supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein

LOS ANGELES-SAN GABRIEL RIVER BASINS AND BALLONA CREEK

The general comprehensive plan for flood control and other purposes in the basins of the Los Angeles and San Gabriel Rivers * * * as set forth in House Document Numbered 838, Seventy-sixth Congress, third session, is approved, and in addition to previous authorizations there

is hereby authorized $25,000,000 for the partial accomplishment of that plan

Approved, August 18, 1941

Excerpt of applicable portion of Rule 38(c) of Court of Claims

"(c) Separate Determination of Liability: Upon stipulation of the parties, subject to approval by the Commissioner, or upon order of the Court or the Commissioner, trials may be limited to the issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery and the amount of offsets, if any, for further proceedings."

APPENDIX "B."

Opinion of the Court of Claims.

In the United States Court of Claims. No. 483-54. (Decided January 15, 1958.)

Southern Counties Gas Company of California v. The United States.

Mr. Bates Booth for the plaintiff. Miss Gertrude Greengard and Mr. Irl Davis Brett were on the briefs.

Mr. Herbert Pittle, with whom was Mr. Assistant Attorney General Perry W. Morton, for the defendant.

FAHY, *Circuit Judge*, sitting by designation, delivered the opinion of the court:

The case is before us on an agreed statement of facts. Under authority of the Act of August 18, 1941, 55 Stat. 638, a flood control project, including a dam, has been erected by the Corps of Engineers, United States Army, to control the flood waters of the Rio Hondo and San Gabriel Rivers at the Whittier Narrows, four miles northwest of Whittier, California. In this connection the United States by condemnation proceedings or negotiations acquired fee title or flowage easements affecting a large area of land and improvements, situated above the dam and below the highest elevation to which the waters to be impounded could rise.

Plaintiff is a public service utility corporation supplying gas to domestic, industrial and commercial consumers in Southern California. It maintained and operated

transmission lines, distribution lines, and service pipes under the surface of public streets and on private property in the area of the project, servicing 387 residential and 7 industrial, commerical, or agricultural customers. Its facilities were installed and maintained under easements from private owners and rights of way granted by the County of Los Angeles and the City of Montebello. Plaintiff was also possessed of private rights of way and easements for service pipes and connections granted by owners of property serviced.

The United States did not expressly acquire by condemnation or otherwise any of plaintiff's above described properties or rights. The declarations of taking and the condemnation complaint were stated to be subject to existing easements for public utilities and pipelines. The United States did, however, contract with plaintiff for the latter to relocate or abandon in place certain of its facilities and also to transfer to the United States its interest in some of its rights of way and easements.[1]

The United States has prohibited human habitation in the taking area and has caused to be razed or removed all structures therein except certain industrial structures which will be raised or buttressed against the maximum possible water elevation. Readjustment and closing of streets and alleys have been brought about by the United States.

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[1]Some areas were acquired by negotiation and purchase. Plaintiff's facilities, rights of way, easements or franchise rights located in and under the dam site and its appurtenant embankments, diversion channels, spillways and outlet works were paid for by the United States at their reasonable value.

If the owners did not desire to retain the improvements on land acquired by the United States, an effort was made by the United States to sell the same. Sales were public on terms which required the purchaser to remove the improvements at his expense. In other instances the United States demolished and removed the improvements. Before being removed, sold, or demolished plaintiff was notified and in some instances was instructed or requested to disconnect or remove its facilities from the premises. This the plaintiff did, blocking off the facilities and taking safety precautions. Plaintiff then abandoned in place the facilities so blocked off and disconnected. The cost of removing them would exceed the amount that could be obtained for them as salvage, so that their value represents a total loss to plaintiff.

Plaintiff's claim is for the value of those property rights and facilities in the area which the United States did not acquire by condemnation or otherwise and for which it has not contracted to pay plaintiff, and for its loss as a going concern in the taking area. The facilities are those which the Army Corps of Engineers has determined do not interfere with the project and are not required for continuance of service. Plaintiff's transmission and distribution facilities servicing 387 residential customers have been disconnected, blocked off, and abandoned. Of its facilities servicing seven industrial consumers in the area, four likewise have been disconnected and abandoned.

As we have seen, the properties for which compensation is sought under the Fifth Amendment were not in terms taken by the United States. They were excepted from the declarations of taking and from the condemna-

tion complaint. Use of the properties was brought to an end by the acquisition by the United States of the land of residential and industrial customers of plaintiff, followed by demolition or removal of improvements which had been serviced by plaintiff.

We think this was not, within the compensation provisions of the Fifth Amendment, a taking of the properties for which compensation is sought by plaintiff. Plaintiff's loss is due to the project, but in law is a consequential and non-compensable loss.[2] This does not follow, however, merely from the fact that no express taking occurred. United States v. Causby, 328 U. S. 256.[2] In the circumstances of that case the Supreme Court held that a "flight easement," not taken in terms, was taken in law by the use of the air above claimant's land by aircraft flying low to and from an adjoining military airport. Unquestionably the Whittier Narrows Dam project has also resulted in the loss by plaintiff of the use and value of some of its properties, and this may be attributed in a sense to the use made by the United States of adjoining land or appurtenant land. But the connection between the use referred to and the loss to plaintiff is indirect and falls within the principle which denies compensation for loss of business.[3]

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[2] In United States v. General Motors Corp., 323 U. S. 373, 378, occurs this statement:

"Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

[3] That business loss is noncompensable, see Joslin Co. v. Providence, 262 U. S. 668; Mitchell v. United States, 267 U. S. 341.

As to the franchise, it seems clear that the falling off of customers, though caused by the project, was not a taking; the franchise became less valuable due to the changed situation in the area, but we cannot construe this as a taking of the franchise. So, too, as to the rights of way and easements. Loss of their use and value is also due to the removal of plaintiff's customers, "an unintended incident of the taking of land." Mitchell v. United States, 267 U. S. 341, 345; Kelletville Gas Co. v. United States, 56 F. Supp. 919, 920. In so holding as to the easements and rights of way we read the agreed statement of facts as not presenting the case of destruction of the availability of easements and rights of way for servicing of premises which remain in the area. If there were land and improvements not taken which could be served by the aid of these easements and rights of way, except for the project, we would have a different question.

As to the underground pipes we note initially that we are not concerned now with value, discussed in United States v. General Motors Corp., 323 U. S. 373, relied upon by plaintiff. See, also, United States v. Welch, 217 U. S. 333. We do not reach value unless the pipes have been taken, which we think is not the case. For the loss here too is due to the taking of the property of others, that is, of plaintiff's customers. A milk distributor, to use a rough analogy, might suffer loss by the turning of the area of a milk route into a public park. But this would not constitute a taking of the route or of the instrumentalities by which it was served. The value of land and improvements might include an element due to their location on the route—a question we do not

decide—but the loss to the milk distributor is a business loss.

Though the line between a compensable and a non-compensable loss is sometimes a thin one, see United States v. Welch, supra, we think this case falls on the side of such cases as Omnia Co. v. United States, 261 U. S. 502, 510, where it is said that "for consequential loss or injury resulting from lawful governmental action, the law affords no remedy." There Monongahela Navigation Co. v. United States, 148 U. S. 312, is distinguished, as it must be in the present case. See, also, Fix v. City of Tacoma, 171 Wash. 196, 17 P. 2d 599.

It follows that plaintiff's petition must be dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
Petitioner

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	8

CITATIONS

Cases:

Deepe v. United States, 103 Colo. 294, 86 P.2d 242	7
Fix v. City Tacoma, 171 Wash. 196, 17 P.2d 599	7
International Paper Co. v. United States, 282 U.S. 399	7
Joslin Manufacturing Co. v. Providence, 262 U.S. 668	6
Kellettville Gas Co. v. United States, 56 F.Supp. 919	6, 7
Kimball Laundry Co. v. United States, 338 U.S. 1	7
Mitchell v. United States, 267 U.S. 341	6
Mullen Benevolent Corp., v. United States, 290 U.S. 89	6
Omnia Commercial Co., Inc. v. United States, 261 U.S. 502	6
Portsmouth Co. v. United States, 260 U.S. 327	6
Public Water Supply District No. 3 v. United States, 133 C.Cls. 348, 135 F.Supp. 887	7
Pumpelly v. Green Bay Company, 13 Wall. 166	7
Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 Pac. 961	7
United States v. Lynah, 188 U.S. 445	7
United States v. Powelson, 319 U.S. 266	6
United States v. Twin City Power Company, 248 F.2d 108	8
United States v. 2979.70 Acres of Land, Etc., 235 F.2d 327	7

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1040

SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
Petitioner

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 3) is reported at 157 F. Supp. 934.

JURISDICTION

The judgment of the Court of Claims was entered on January 15, 1958 (R. 35). A timely petition for rehearing was denied on March 5, 1958 (R. 45). The petition for a writ of certiorari was filed on May 31,

1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, on the facts of this case, the court below correctly concluded that the Government has made just compensation for all property it has taken from petitioner gas company and that the further compensation sought by petitioner constitutes an effort to recover for a noncompensable loss of business.

STATEMENT

The United States has constructed a dam at Whittier, California, to intercept and temporarily impound flood waters of the Rio Hondo and San Gabriel Rivers where they converge. The height of the dam is 239 feet above sea level or 55 feet above the Rio Hondo Channel. The dam and the area devoted to reservoir purposes are designed to hold water up to a contour elevation of 229 feet, thus insuring against the dangers of flood (Findings 2-7).

By condemnation or purchase, the United States acquired flowage easements over, or the fee simple title to, approximately 2,912 acres of land (including improvements thereon) for the dam site and reservoir (Findings 8-9). The complaint, declarations of taking and amendments filed in the condemnation case recited (Findings 8, 12) that the United States acquired the tracts described subject

> to existing easements for public roads and highways, public utilities, railroads and pipe lines; and to existing easements for flood control purposes of the Los Angeles County Flood Control District.

Petitioner owned and operated a network of underground transmission lines, service pipes and distribution facilities in the condemned area. These facilities, which had been used for supplying gas to some 394 customers in that area, had been installed on private property and in the public streets and alleys pursuant to rights of way and deeded easements granted to petitioner (Findings 10-11). The United States has prohibited human habitation in the area taken and has removed all the structures except certain industrial structures which have been buttressed against the maximum possible water elevation (Finding 9).

The United States did not condemn, purchase, or otherwise acquire any part of petitioner's facilities, rights-of-way, easements or franchise rights, except for certain facilities which were located in and under the dam site and its appurtenant embankments, diversion channels, spillways and outlet works. For these latter facilities, the United States contracted to pay or has paid the reasonable value (Finding 13). Also, the United States contracted with petitioner for the relocation, alteration, removal or abandonment of certain operating facilities located within a portion (segment G) of the Project, and for the transfer and granting to the Government of all petitioner's right, title and interest in that area (Finding 14).

After the United States acquired the various buildings in the reservoir area, petitioner was informed that its services were no longer required and it was requested to disconnect and remove its meters and facilities from those buildings. Petitioner complied with those requests and abandoned its facilities in place because the cost of removal would have exceeded their salvage value (Finding 17).

Petitioner brought this action to recover $188,812.60 as just compensation for the property rights and facilities in the reservoir area which the United States did not acquire by condemnation or otherwise and for which petitioner has not been paid. The Government denied liability. The issue was presented upon an agreed statement of facts. The Court of Claims held that the United States is not liable, on the ground that it did not take the property in question, but merely deprived petitioner of customers, thus causing a noncompensable business loss. A different question would be presented, the court held, if petitioner's system in the project area were one adapted for serving customers outside that area.

ARGUMENT

Petitioner seeks review on the ground that the Court of Claims "overlooked" certain facts (Pet. 5). But the court below had before it, and took account of, all the facts which petitioner discusses. Essentially the contention is that the court below should have made different findings.

Petitioner asserts, as an "overlooked" fact, that the facilities located within the area taken "served areas outside" of that area (Pet. 5). The Court of Claims found otherwise (Pet. App. 7). It expressly relied upon the agreed statement of facts. That statement was stipulated to constitute "a full and correct statement of the facts relevant and pertinent to the * * * claim" and reserved the right "to the production of such other and further evidence as shall be necessary or proper for the determination of the issue of liability herein" (Par. 21). Petitioner produced no further evidence. Moreover, it was argued by Government

counsel in the court below that there were no persons outside the area served by these facilities but, that even if there were, petitioner could continue to serve them.[1] Thus this fact was not "overlooked" but presented for determination. The franchises and maps (Exhibit C and F) relied upon here (Pet. 4) were before the court as parts of the agreed statement of facts (Pars. 12 and 20). Schedule III to the petition, also relied upon here (Pet. 4), was before the court merely as a schedule of the compensation sought and was referred to in the agreed statement as "plaintiff's claim herein" (Par. 20). It is self-serving and was denied in the Government's answer (Par. 6).

Petitioner further asserts, as an "overlooked" fact, that it is "making no claim for loss of business through loss of customers or otherwise," but in the same sentence it states, as a third "overlooked" fact, that "petitioner's loss of the value of the physical facilities in place was caused directly by the Government's instruction that they be disconnected and their being blocked off in compliance with such instruction" (Pet. 5). The "loss of value" described in the latter statement can only derive from "loss of customers."

When the Government acquired the buildings which petitioner served, it merely instructed petitioner to disconnect the meters and block off the pipes because it did not want the service. Any or all of the prior consumers could have done the same without incurring liability to petitioner. The Government did not take petitioner's pipes or easements. As the Court of Claims

[1] The Government's brief stated (p. 18): "The plaintiff's pipes which it installed along or under these easements are still in place. The occasional infrequent future flooding of the area has not resulted and cannot result in any appreciable damage to the plaintiff insofar as those easements are concerned."

said (Pet. App. 7): "We do not reach value unless the pipes have been taken, which we think is not the case." Petitioner was at liberty to leave the pipes in place or to remove them. The Court of Claims obviously agreed, as it was entitled to do, with the determination by the Army Corps of Engineers, set out in the agreed statement (Par. 16), that the facilities involved here were not taken because they "do not interfere with the project and are not required for continuance of service."[2] It is plain, therefore, that petitioner's loss stems solely from loss of customers.

Loss of customers is a business loss. As this Court has repeatedly held, the Government must pay only for what it takes and not for opportunities which the owner may lose. *United States* v. *Powelson,* 319 U.S. 266, 282; *Mullen Benevolent Corp.* v. *United States,* 290 U.S. 89; *Mitchell* v. *United States,* 267 U.S. 341; *Joslin Manufacturing Co.* v. *Providence,* 262 U.S. 668; *Omnia Commercial Co., Inc.* v. *United States,* 261 U.S. 502.

The principle has been uniformly applied to utility company business losses of the very kind involved here. Thus, in *Kellettville Gas Co.* v. *United States,* 56 F. Supp. 919 (W.D. Pa.), the Government acquired all property except the Gas Company's mains and easements within an area to be flooded by a dam. The court said (p. 922):

> The loss of The Kellettville Gas Company was a loss of customers which is a business loss. If a merchant in Kellettville, with an established good

[2] The Government purchased and paid petitioner "the reasonable value" ($53,424.92) for all facilities which had to be rearranged or relocated or which could not be removed (Agreed Statement, pars. 14-15; Findings, pars. 13-14).

> will and business, lost all his customers from the same cause, he would not be entitled to recover from the United States the amount of his business loss. The same would be true of the loss sustained by a physician or a lawyer with an established clientele. If a private individual acquired the same property in Kellettville as the United States did and razed the buildings thereon, he would not be required to compensate the company for its loss. The United States is in the same position.

To the same effect are *Fix* v. *City of Tacoma*, 171 Wash. 196, 17 P.2d 599, and *Deepe* v. *United States*, 103 Colo. 294, 86 P.2d 242, involving, respectively, a water company and a telephone company.[3] Cf. *Public Water Supply District No. 3* v. *United States*, 133 C. Cls. 348, 135 F. Supp. 887.

Contrary to petitioner's suggestion (Pet. 6), the decision below does not conflict with *International Paper Co.* v. *United States*, 282 U.S. 399. In that case, "the Government took the property that the petitioner owned" (p. 408). That distinction, as well as numerous others, applies to the other cases upon which petitioner relies (Pet. 9, 10, 13, 14): *United States* v. *Lynah*, 188 U.S. 445; *Portsmouth Co.* v. *United States*, 260 U.S. 327; *Pumpelly* v. *Green Bay Company*, 13 Wall. 166; *Southern Pac. R. Co.* v. *San Francisco Sav. Union*, 146 Cal. 290, 79 Pac. 961; *Kimball Laundry Co.* v. *United States*, 338 U.S. 1; *United States* v. *2979.72 Acres of Land, Etc.*, 235 F.2d 327 (C.A. 4); *United*

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[3] Petitioner has misread the *Kellettville* case and inserted in the passage which it quotes (Pet. 12) a parenthetical phrase contrary to what the court found, *i.e.*, that the gas mains there were *below* the maximum water level. Similarly, the water mains in the *Fix* case were within the "taking area."

States v. *Twin City Power Company*, 248 F.2d 108 (C.A. 4).

CONCLUSION

The decision below rests on the settled principle that frustration of business opportunities in consequence of a taking for public use does not give rise to a claim under the Fifth Amendment. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 78

SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Claims.

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION.

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TOPICAL INDEX

Statement .....

Question presented .....

Argument .....

Conclusion .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1040

SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Claims.

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION.

Statement.

The court below stated:

> "In so holding as to the easements and rights of way, we read the agreed Statement of Facts as not presenting the case of destruction of the availability of easements and rights of way for servicing of premises which remain in the area. If there were land and improvements not taken which could be served by the aid of these easements and rights of way, except for the project, we would have a different question." (Petition, Appendix B, p. 7.)

In spite of this statement, the Government's brief in opposition contends that the court below took cognizance of the fact that a large segment of the pipes and easements destroyed by the Government's taking did in fact

service areas outside of the taking area, and also recognized that part of the claim was for the cost of building new facilities to service these areas outside the taking area. (Govt. Br. pp. 4, 5.)

The Government's brief further states, at page 5:

> "Moreover, it was urged by Government counsel in the court below that there were no persons outside the area served by these facilities but, that even if there were, petitioner could continue to serve them. Thus this fact was not 'overlooked' but presented for determination."

Government's counsel at the hearing below is not a party to its brief in this Court, and those signing are mistaken. Nothing in the Statement of Facts suggests that all of Petitioner's pipes (some as large as 10 inches in diameter) terminated in the taking area and serviced nothing but premises now removed for the reservoir. This Reply will point out that facilities subjected to submersion in the Government's taking area did service outside the area, and as pointed out in the Petition (p. 10), Petitioner cannot use a pipeline for transmission of such an explosive product as natural gas after the Government has taken away its right of immediate access. [R. 30, par. 18; R. 44, par. 17.] The Court below obviously did not have such facts in mind, or it could not have made the statement quoted.

Question Presented.

DID THE COURT BELOW COMMIT FACTUAL ERROR IN BASING ITS DECISION ON THE MISTAKEN PREMISE THAT PETITIONER'S PIPES AND EASEMENTS DID NOT SERVICE BEYOND THE TAKING AREA, AND THAT THESE AND OTHER PIPES WERE NOT EFFECTIVELY DESTROYED BY THE GOVERNMENT?

Argument.

I.

Schedule III, attached to and incorporated in the petition in the Court of Claims and in the record here, is for the following loss inflicted by the Government:

> "FACILITIES TO BE RETIRED. FUNCTION OF THESE FACILTIES TO BE RELOCATED TO PROVIDE GAS SUPPLY TO TRACT NO. 15601, EAST OF DURFEE RD. AT MAPLE AND CENTRAL AVES., OUTSIDE OF THE TAKING AREA."

Exhibit F, the original of which is before this Court, shows in purple all of the pipelines contained in Schedule III for which substitutes had to be built by Petitioner outside the taking area in order to continue its service outside the taking area. In addition, Schedules I and II of the Petition, as delineated on Exhibit F, show the destroyed portions of Petitioner's pipelines reaching to the perimeter of the taking area, the projection of which clearly extends into areas not taken. The schedules of Petitioner's claim itemize thousands of feet of 10" pipeline, obviously a transmission line as distinguished from a distribution line (the former for the transmission of gas to large areas of consumption, the latter being 1¼" and 2" lines for the servicing of households). These lines are all marked and their routes plainly coursed in Exhibit F. Particular attention is called to Item 27-R where the transmission line extends to the perimeter of the taking area and obviously projects beyond. Item 28-R is another case in point. Attention is also called to Items 22-R and 23-R in San Gabriel and Lincoln Avenues where a segment of 10" transmission line in the taking area obviously projected outside the taking area in both directions.

II.

The Government further contends that it is simply in the position of other customers who choose to discontinue Petitioner's service. (Govt. Br. pp. 5, 6.) The Government was not a customer, nor similar to a customer. It was a condemnor, who took the customers out of the taking area and blocked it off. By asserting an exception in its complaint, the Government tried to avoid liability for Petitioner's property while paying for all other interests. [R. 27-28, 42.] No customer or group of customers could destroy the value of Petitioner's pipes in the streets and on owned rights of way, but the Government could and did so, by the exercise of its sovereign right of eminent domain. A customer who simply sought to discontinue Petitioner's service would not and could not affect Petitioner's transmission lines. Here the Government has destroyed them all, not just the service pipes on customer's premises. [Findings, par. 18.]

Conclusion.

Petitioner seeks to have this Court correct an obvious error. Petitioner seeks nothing for loss of customers, so the opinion of the court below is inapropos. The analogy to the "milkman customers" is far wide of the mark. It is the "milkman's truck" itself, or in the Petitioner's case, the pipelines which have been taken.

Petitioner seeks nothing for its franchise. Indeed, it seeks nothing for its easements. It seeks only the value of its pipe, which is now buried under the Government's reservoir area. This pipe is part of the Petitioner's capital structure. It is physical, tangible property, and its loss from Petitioner's capital structure is

the direct result of the Government's construction of a dam and taking of a reservoir.

What possible distinction is there between pipe buried under the dam, for which the Government paid Petitioner [Findings, pars. 13-14], and pipe buried under a reservoir formed by the dam? Why in law or reason should compensation be paid for one, denied for the other?

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